(12)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1021

WALT DISNEY PRODUCTIONS, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Walt Disney Productions, a corporation, respectfully petitions that a writ of certiorari issue to review the final judgment of the Circuit Court of Appeals for the Ninth Circuit in that certain cause therein entitled "National Labor Relations Board, Petitioner, vs. Walt Disney Productions, Respondent," being therein numbered 10603. Said judgment was entered by said Circuit Court of Appeals on December 5, 1944. [R. 1376.] A petition for rehearing was filed by Walt Disney Productions within the time allowed therefor by rule of court and an order denying said petition for rehearing was filed on January 6, 1945. [R. 1395.]

Opinion Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit in this cause is set forth in full at R. 1377.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A., Section 347(a).)

Questions Presented.

1. Must not resort be had to the grievance and arbitration procedure established in an existing collective bargaining agreement before an assertedly improper discharge case may be carried by the employee to the National Labor Relations Board as an alleged unfair labor practice when the employer is ready and willing to arbitrate?

2. Is not the Circuit Court of Appeals in error in this proceeding in not holding, in accordance with decisions of the Second, Fourth, Fifth and Seventh Circuit Courts of Appeals, that there must be findings supported by the evidence that the *purpose* and *effect* of the asserted discharge was to encourage or discourage membership in any labor organization within the meaning of Section 8(3) of the Act, in order to uphold the Board's order? Can there be any such *effect* where there is a *closed-shop* collective bargaining agreement in effect at all times?

3. Is not the Board's order of reinstatement of the employee (now in the armed forces) punitive and erroneous as imposing conditions of reinstatement more onerous than those governing reinstatement of returning members of the armed forces generally under the Selective Training and Service Act of 1940, as amended?

Summary Statement of Matter Involved.

Petitioner Walt Disney Productions is a California corporation engaged in the production of animated motion pictures and sound cartoons.

The National Labor Relations Board issued a complaint against petitioner, alleging an unfair labor practice within the meaning of Section 8(1) and (3) of the National Labor Relations Act (29 U. S. C. A. 158 (1) and (3)), on the ground that petitioner had, on November 24, 1941, discriminatorily discharged Arthur Babbitt, an animator in petitioner's employ, for engaging in union activities. Babbitt was and is a member of Screen Cartoonists' Local 852, affiliated with the American Federation of Labor's Brotherhood of Painters, Decorators and Paperhangers of America (herein called "the Union").

After a hearing in October, 1942, the Trial Examiner recommended findings and conclusions that Babbitt had been discriminatorily* discharged and that unfair labor practices had been committed by petitioner, and recommended a cease and desist order, together with an order of reinstatement of Babbitt. The Board, in March, 1943,

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*Petitioner denied any discriminatory intent or purpose in the Babbitt layoff and submitted a large volume of evidence which it believed disproved the charge. The Trial Examiner and the Board completely disregarded the main portions of petitioner's evidence on this issue. This disregard of evidence, much of it undisputed, was urged as error before the Circuit Court of Appeals, but that Court adopted the view that it was bound by the Board's findings, as it concluded there was some evidence in support of the material findings. While petitioner believes serious error was committed in this respect, it recognizes that, under the rules governing the issuance of a writ of certiorari by this Honorable Court, this is not the type of issue this Court will consider, and hence petitioner will refrain from attempting to inject any such issue into this Petition and Brief.

adopted the recommended findings and conclusions, entered a cease and desist order, and ordered that petitioner reinstate Babbitt with back pay. The Board, in November, 1943, petitioned the Ninth Circuit Court of Appeals for enforcement of said order. The Ninth Circuit Court of Appeals, on December 5, 1944, entered its decree granting the Board's petition to enforce said order with certain modifications, namely, (i) that Babbitt's back pay should commence only from the date he filed his charge with the Board rather than the date of his discharge, due to his delay in filing the charge, (ii) that the blanket cease and desist order should be deleted, and (iii) clarifying certain general language of the Board's order. [R. 1392, 1389-1391.]

Only a few of the facts involved in this proceeding need be stated to raise the issues that petitioner calls to the attention of this Court:

Babbitt had become a member of the United States armed forces in November of 1942, after the hearing before the Trial Examiner, and after the Trial Examiner had made his recommended findings, conclusions and order. This circumstance was brought to the Board's attention by stipulation. [R. 108.] The Board's order took this fact into consideration to a certain extent in ordering petitioner to offer Babbitt reinstatement upon his discharge from the armed forces. [R. 115.] However, the Board and the Court below erred, we will urge in this Petition and Brief, in not imposing certain limitations upon the reinstatement order in view of the employee's status in the armed services. It might be mentioned that Babbitt is still in the armed services.

Reverting to a few of the circumstances surrounding Babbitt's layoff necessary to be mentioned in bringing the issues before this Court: Babbitt had been active in the Union in the spring and summer of 1941 and during a strike at petitioner's studio during that summer. [R. 1379-1380.] The strike was concluded through the efforts of the United States Conciliation Service, members of which acted as arbitrators in settling certain issues resulting in a closed-shop collective bargaining agreement between petitioner and the Union on August 2, 1941. This collective bargaining agreement included a grievance and arbitration procedure for all disputes. [R. 1380.] The studio was closed down for a period of four weeks pending reorganization as a result of the strike, but opened on September 11, 1941, and all employees who had been dismissed during the strike were reinstated. This included reinstatement of Babbitt at the same time. [R. 1380-1381.] Approximately 250 employees were laid off at the time the studio reopened, pursuant to a formula determined by the arbitrators and agreed to by the Union and petitioner. However, Babbitt was reinstated as an animator at petitioner's studio. [R. 1381.] Thereafter, the volume of production having dropped off very materially, a further layoff of 98 employees, including eleven animators, was determined upon and carried out on November 24, 1941. Included among the 98 thus laid off was Arthur Babbitt, one of eleven animators in that layoff group. [R. 1381.] It was this layoff of Babbitt that resulted in his filing the charge with the Board the following May, of an unfair labor practice, which resulted in the hearing and order above outlined.

Of the 98 employees laid off on November 24, 1941, approximately ten filed grievances with the Grievance and

Arbitration Committee in accordance with the grievance and arbitration procedure of the collective bargaining agreement. All those grievances were amicably settled. [R. 844-863.] Many other grievances have been taken up in accordance with the grievance provisions of the collective bargaining agreement, and every one of them has been satisfactorily settled. [R. 862-864.]

The only grievance arising out of the layoff of November 24, 1941, that was not submitted to the Grievance and Arbitration Committee, in accordance with the Union agreement, was the claim of Babbitt that he had been discriminatorily discharged. Babbitt had advised the Business Agent of the Union that his, Babbitt's, case should not be taken up with the other grievances, and that he, Babbitt, would take up his grievance separately, stating that he was in a separate category by reason of the special provision in the arbitrator's award of August 2, 1941.*

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*The special reference to Babbitt in the Award of August 2, 1941, is as follows:

> "However, with respect to the case of Art Babbitt, it is the judgment of the arbitrators that he be reinstated to his former position and not subject to discharge incident to reorganization, except for cause." [R. 336.]

Such reference in the Award afforded this particular employee no ground for refusing to follow the grievance and arbitration procedure in the settlement of his grievance that his layoff on November 24, 1941, was improper. His claim in that regard was simply "a dispute" which called for settlement through the grievance and arbitration procedure. Petitioner's position is that the term "incident to reorganization," had a well defined and well understood meaning. "Reorganization" was intended to refer to the reopening of petitioner's studio in the first part of September, 1941, at which time approximately 250 employees were laid off. It was known at the time of the Award that a large layoff "incident to reorganization" of the studio was necessary, due to lack of available production work at the studio. [R. 336.] After this reorganization was completed, in the middle of September, 1941, and after the studio had

[R. 844-845.] Instead of following the grievance and arbitration procedure, Babbitt, six months later, on May 28, 1942, filed the unfair labor practice charge with the Board. [R. 1-2.]

Prior to the expiration of the period of the collective bargaining agreement of August 2, 1941, which expired in October, 1942, a new collective bargaining agreement was negotiated between petitioner and the Union, dated October 6, 1942, for a period of two years from that date. This new collective bargaining agreement contained an express provision for grievances and arbitration of all disputes between Union members and petitioner. [R. 868, 877-879.] This new collective bargaining agreement likewise contained a closed-shop provision. It might be added that the closed shop and collective bargaining agreement between the Union and petitioner has been in effect at all times and is presently in effect, containing like provisions.

Petitioner and the Union have faithfully followed the collective bargaining agreements, including the closed-shop and grievance procedures. [R. 863-868.]

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been reopened and was in full operation, an entirely new situation arose due to further decline in business. The layoff of 98 persons on November 24, 1941, was the result of the further decline in business two months after the studio had been reorganized and reopened. Hence the layoffs on November 24, 1941, were not, as petitioner views it, in any way "incident to reorganization." Hence, petitioner was free to exercise its managerial judgment with respect to this employee as well as all other employees in that, and all future, layoffs.

But whether or not petitioner was right in this contention, merely created "a dispute" under the terms of the collective bargain. This dispute, as well as any other, was and is subject to the arbitration procedure of the collective bargain. This particular employee had no more right to refuse to submit this matter of interpretation and dispute to arbitration than he had to refuse arbitration on any other type of dispute.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that Babbitt might take his grievance, involving a discharge issue, directly to the Board as an unfair labor practice charge, rather than having it settled through the collective bargaining agreement's procedure for arbitrating grievances, in view of the closed-shop collective bargaining agreement between petitioner and the Union in effect at all material times, whereby the Union and all its members were bound first to present any grievance or dispute for final settlement through the grievance and arbitration procedure.

2. In holding that there was or could have been any evidence in support of the Board's finding that the *purpose* and *effect* of Babbitt's layoff was to encourage or discourage membership in any labor organization, within the meaning of Section 8(3) of the National Labor Relations Act, in view of the closed-shop collective bargaining agreement in effect at all material times.

3. In holding that, in any event, the Board's order of reinstatement should not be modified to delete the punitive feature of the order requiring reinstatement of Babbitt upon his discharge from the armed services of the United States, without imposing the same limitations and conditions as contained in Section 8(b) of the Selective Training and Service Act.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals, holding that the Board may hear and determine the grievance, involving a discharge issue, as an unfair labor practice charge, without compelling the employee first to follow the grievance and arbitration procedure contained in the collective bargaining agreement between the employer and his Union, involves an important question of Federal law which has not been, but should be, settled by this Honorable Court. It is believed that this question is a highly important one, since it affects the integrity of innumerable collective bargaining agreements containing like grievance and arbitration provisions calling for the peaceful and amicable settlement of just such labor disputes. A rule allowing resort to the courts in such cases, without requiring the parties first to exhaust their remedy by arbitration, defeats the very purpose of collective bargaining. Our research has not disclosed another proceeding in which this question has been squarely presented for decision, either to the Circuit Courts of Appeals or to this Honorable Court.

2. The decision of the Circuit Court of Appeals in this proceeding is in conflict with the Second, Fourth, Fifth and Seventh Circuit Courts of Appeals in holding that there need be no substantial evidence that both the *purpose* and *effect* of a discharge found to be discriminatory is to encourage or discourage membership in any labor organization within the meaning of Section 8(3) of the Act.

3. The decision of the Circuit Court of Appeals, in refusing to impose the limitations and conditions of Section 8(b) of the Selective Training and Service Act of

1940 upon petitioner's duty of reinstatement of Babbitt when he is discharged from the armed services, involves the decision of a Federal question in a way that is probably in conflict with applicable decisions of this Honorable Court.

Petitioner respectfully represents that said questions properly appear in the record and were raised before the Trial Examiner, the Board, and the Circuit Court of Appeals.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the Seal of this Honorable Court directed to the Circuit Court of Appeals for the Ninth Circuit, requiring the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals in the case numbered 10603 and entitled "National Labor Relations Board, Petitioner, vs. Walt Disney Productions, Respondent," to be reviewed and determined by this Honorable Court as provided by law; that the judgment of said Circuit Court of Appeals herein be reversed by this Honorable Court; and for such further relief as to this Court may seem proper.

Dated February 23, 1945.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

WALT DISNEY PRODUCTIONS, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

SUMMARY OF ARGUMENT.

A. The Grievance and Arbitration Provision Contained in the Collective Bargaining Agreement Prevents the Discharge Issue From Burdening Interstate Commerce and Hence the Board Has No Jurisdiction Over This Proceeding.

1. The purpose and object of the Act was to remove obstacles to collective bargaining.

2. The corollary purpose and object of the Act was to compel collective bargaining agreements once reached

to be binding on both employer, the union and its members.

3. An employee is bound by the collective bargaining agreement made by his agent, the Union.

4. Only by compelling the Union and its members to abide by the collective bargaining agreement will the fundamental purpose of Congress be accomplished.

5. It is a wrong view of the Act to allow a grievance matter to be taken to the Board as an unfair labor charge rather than to settle it through the collective bargaining agreement's procedure for arbitrating grievances.

6. No substantial interference with or burden upon commerce is possible in a grievance over a discharge issue so long as the employer abides by its collective bargain.

7. The Board's jurisdiction does not attach unless the unfair labor practice complained of interferes so substantially with the public rights created by Section 7 of the Act as to require its restraint in the public interest.

8. Proper interpretation of Section 10(a) of the Act denies the Board jurisdiction over a grievance involving a discharge issue where a collective bargain provides for arbitration of grievances.

B. The Purpose and Effect of Employee's Layoff Was Not to Discourage or Encourage Membership in Any Labor Organization Within Section 8(3) of the Act.

1. The Act, as interpreted by the Second, Fourth, Fifth and Seventh Circuit Courts of Appeals, contrary to the holding of the Ninth Circuit Court of Appeals in the instant proceeding, requires that the Board make a finding, supported by substantial evidence, that both the *purpose*

and *effect* of a discriminatory discharge is to encourage or discourage membership in any labor organization.

2. The affirmative evidence in this case disproves any *purpose* or *effect* to encourage or discourage membership in any labor organization, in view of (i) the closed-shop agreement in effect at all material times, (ii) the fact that Babbitt is and was at all times a member of the Union, and (iii) the fact that there is no evidence in the record in support of the Board's finding on this issue.

C. The Board's Order Is Punitive Rather Than Remedial in Requiring Reinstatement of Babbitt Upon His Discharge From the Armed Services Without Imposing the Same Conditions and Limitations as Are Found in Section 8(b) of the Selective Training and Service Act.

1. Congress has established the legal obligation of re-employment of a former employee who has been drafted or has enlisted in the armed services, upon his discharge therefrom, and has imposed several conditions and limitations upon such duty of re-employment.

2. In fixing a different and more burdensome duty of reinstating Babbitt upon his discharge from the armed services in the instant case, the Board's order becomes punitive rather than remedial.

3. Under decisions of this Honorable Court, the power of the Board to command affirmative action is remedial and not punitive.

4. Hence, the Board's order is in error, and the Court's decision granting enforcement is likewise erroneous, in any event, in refusing to impose the same limitations and conditions upon petitioner's obligation of reinstating Babbitt after he is discharged from the armed services.

II.

BRIEF.

A. The Grievance and Arbitration Provision Contained in the Collective Bargaining Agreement Prevents the Discharge Issue From Burdening Interstate Commerce and Hence the Board Has No Jurisdiction Over This Proceeding.

1. The Purpose and Object of the Act Was to Encourage the Procedure of Collective Bargaining.

The preamble of the Act makes it plain that the driving force underlying the Act was the removal of obstructions to collective bargaining. The Congressional intent is found in the preamble of the Act in the following portions thereof:

> "the refusal by employers to accept the procedure of collective bargaining"

leads to unrest, burdening commerce.

> "Experiences prove that protection by law of the right of employees to organized and bargain collectively safeguards commerce from injury * * * by encouraging practices fundamental to the friendly adjustment of industrial disputes * * *."
>
> "it is hereby declared to be the policy of the United States"

to eliminate obstructions to commerce

> "by encouraging the practice and procedure of collective bargaining." (29 U. S. C. A., Sec. 151.)

This Honorable Court has announced this same purpose and object of Congress in establishing the Act.

In Phelps Dodge Corporation v. N. L. R. B. (1941), 313 U. S. 177, 186, Mr. Justice Frankfurter stated that:

> "Indisputably the removal of such obstructions [to collective bargaining] was the driving force behind the enactment of the National Labor Relations Act."

N. L. R. B. v. Fansteel Metallurgical Corporation (1939), 306 U. S. 240, 257, stated that:

> "* * * the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act."

2. Collective Bargaining Agreements, Once Effected, Should Bind Employer, Union and Employees Was the Purpose of Congress in Establishing the Act.

Compelling collective bargaining to the end that an agreement once reached would be binding upon the employer, the Union and each of its members was the corollary purpose of Congress.

N. L. R. B. v. Sands Manufacturing Company (1939), 306 U. S. 332, 342, states that:

> "* * * the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made."

3. The Employee Is Bound by the Collective Bargain Made by His Agent, the Union.

The employee appoints the Union his agent to bargain collectively with his employer. (*N. L. R. B. v. Mason Manufacturing Co.* (C. C. A. 9, 1942), 126 Fed. (2d)

810, 813.) He is bound by that contract to the same extent as if he had signed it personally. (*North American Aviation, Inc.* (Sept. 29, 1942), 44 N. L. R. B. 604, 611—reversed in 136 Fed. (2d) 898, but on other grounds.)

Instead of complying with the provisions of the collective bargaining agreement, requiring submission of his grievance to arbitration, the employee in this case, Babbitt, has renounced that procedure, has disregarded the collective bargain, and has filed an unfair labor charge with the Board. This he should not be permitted to do, so long as petitioner is ready and willing to abide by the grievance and arbitration provisions of the collective bargaining agreement.

Only by adopting and enforcing such a rule will the purpose and object of the Act to compel collective bargaining agreements binding on all parties be carried out.

4. Wrong View of the Act to Allow a Grievance Matter to Be Taken to the Board Rather Than to Settle It Through the Collective Bargaining Agreement's Procedure for Arbitrating Grievances.

We strongly urge that it is an entire misconception of the Congressional intent and language of the Act to permit a grievance matter to be taken directly to the Board as an unfair labor charge before even attempting to settle it in accordance with the collective bargain through arbitrating the grievance. Such a rule nullifies the collective bargaining agreement to that extent. It is entirely wrong, we submit.

5. No Substantial Interference With or Burden Upon Interstate Commerce Is Possible as Long as Petitioner Abides by Its Collective Bargain.

There can be no interference with or burden upon interstate commerce in a dispute case over a discharge issue, so long as petitioner performs its collective bargain. Instead of imposing a burden upon or interference with such commerce, petitioner stands ready and willing to follow the course of friendly adjustment of this industrial dispute. It is insisting that the controversy be peaceably settled in the manner to which the complaining witness agreed through his agent, the Union, in making the collective bargain containing the grievance and arbitration procedure.

Hence, as a matter of jurisdiction, there has been and can be no interference with or burden upon interstate commerce in this particular case. For that reason, the Board's order should be denied enforcement.

6. The Public Rights Created by Section 7 of the Act Must Be Substantially Interfered With, Requiring Restraint in the Public Interest, Before the Board's Jurisdiction Attaches.

The mere fact that a dispute involving a discharge issue has arisen is not of itself sufficient to vest the Board with jurisdiction when the employee has his remedy through a grievance and arbitration provision in a collective bargaining agreement binding upon him. Unless the alleged unfair labor practice interferes so substantially with the public rights created by Section 7 as to require its restraint

in the public interest, we submit that the Board has no jurisdiction over the matter.* We respectfully urge that the Court below was in error in adopting the Board's argument that any assertion of an unfair labor practice calls upon and requires the Board to enforce a public right. It seems obvious to us that no public right is substantially interfered with where a dispute has arisen as to the propriety of a layoff or discharge, but where the employer and employee have agreed in advance that they will be bound to arbitrate such dispute and where the employer stands ready and willing to carry out such arbitration. Certainly the parties are competent to agree to be bound to adjust such dispute peaceably and amicably through a

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*In a case relied upon by the Board in its brief before the Circuit Court of Appeals in this matter (*N. L. R. B. v. Newark Morning Ledger* (C. C. A. 3 (1941), 120 Fed. (2d) 262, 268, cert. denied (1941) 314 U. S. 693, 86 L. Ed. 554)), where there was *no* provision for arbitration of grievances, the Court there said that:

> "The jurisdiction is not to be exercised unless in the opinion of the Board the unfair labor practice complained of interferes so substantially with the public rights created by Section 7 as to require restraint in the public interest. As we have seen, the mere fact that a private right of an employee has been infringed by the act of an employer is not of itself sufficient to bring the Board's powers into play."

The only exception we take to the foregoing quotation as a correct statement of law is the phrase "in the opinion of the Board." While it is a matter for the Board's judgment in the first instance, we respectfully assert that before this Court will uphold the Board's jurisdiction, there must be substantial evidence to support the express or implied finding that the public rights have been so substantially interfered with as to require restraint in the public interest. We further respectfully assert that where, as here, the collective bargaining agreement provides for and requires arbitration of all grievances, and the employer is ready to arbitrate, there can be no substantial interference with the public rights requiring restraint by Court enforcement in the public interest.

grievance procedure leading up to arbitration. This is the very object of the Act. The public is in no way injured by such an agreement. Nor is there any right of the public that is invaded by allowing or compelling the parties to exhaust their grievance and arbitration procedure before calling upon the Board and the courts for relief. To the contrary, the public rights are more evidently protected by carrying out the Congressional intent of encouraging and fostering collective bargaining in requiring all parties to carry out the terms of their agreement.

7. The Grievance and Arbitration Procedure Affords an Adequate and Complete Remedy to the Employee.

The Board's order in a discriminatory discharge case simply requires that the employee be reinstated with back pay. *This is exactly what the arbitrator will do if he finds the discharge to be discriminatory.* The arbitrator will make the same order, if he so finds, to reinstate the employee with back pay. Furthermore, his award is enforcible by summary judgment in the State court.* Thus the Board order accomplishes nothing in the way of enforcing any supposed public right, or in the way of "punishing" the employer, which would not be accomplished, and to the same extent, by an arbitrator's award.

**Levy v. Superior Court* (1940), 15 Cal. (2d) 692, involved an arbitration under a collective bargaining agreement of a charge of discriminatory reemployment following a strike. The arbitrator found discrimination and ordered reinstatement. The California Supreme Court held the award entitled to summary judgment of confirmation under Code of Civil Procedure, Section 1287. This is the general rule followed in other states. See 15 Cal. (2d), at p. 700.

8. The National War Labor Board Has Adopted the Rule Here Contended for, That a Grievance and Arbitration Procedure Must First Be Exhausted Before That Board Will Take Jurisdiction, Even of a Discharge Issue.

War Labor Board decisions demonstrate that there is no public right interfered with which requires that Board to assume jurisdiction until available grievance and arbitration procedures are exhausted. That Board has announced the same rule, requiring exhaustion of arbitration procedure, even of disputes involving issues of claimed wrongful discharge.

Cudahy Bros. Co. (March 29, 1944), 14 Labor Relations Reporter 188;

Republic Steel Corp. (April 12, 1944), 15 W. L. R. 490;

Resolution of Regional War Labor Board IV, issued April 12, 1944, 15 W. L. R. XIV;

In re Texoma Natural Gas Co. (July 20, 1943), 12 U. S. L. W. 2099;

In re Carnegie-Illinois Steel Corp. (Jan. 28, 1944), 12 U. S. L. W. 2517.*

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*The War Labor Board cases are referred to by way of analogy only, it not being the contention of petitioner that they are other than merely persuasive of what the proper rule should be in connection with proceedings before the National Labor Relations Board.

9. The Proper Rule To Be Adopted by This Court Would Be One Similar to the Rule Adopted Where Administrative Remedies Are Available, Requiring the Complainant to Exhaust His Remedy of Arbitration Before Any Public Right Requires Protection by a Board Proceeding.

We respectfully suggest that the proper rule to be adopted by this Court, in cases where an existing collective bargaining agreement requires submission of all disputes through grievance and arbitration procedure, would be to require that the complaining party exhaust his remedy through the grievance and arbitration procedure before the Board may assume jurisdiction. This rule would then be identical with the rule requiring a party to exhaust available administrative remedies before resorting to court proceedings. Thus, and thus only, may the two paramount objects of the Act be accomplished, namely, the object of fostering and encouraging amicable settlement of industrial disputes through binding collective bargaining agreements, on the one hand, and, on the other hand, the protection of the public rights recognized by Congress in the Act.

10. Proper Interpretation of Section 10(a) of the Act Denies the Board Any Jurisdiction Where an Existing Collective Bargain Provides for Arbitration of Grievances.

The Court below adopted the view, urged by the Board, that Section 10(a) of the Act conferred exclusive jurisdiction upon the Board to the extent that the remedy of arbitration contained in the collective bargaining agreement must be disregarded.

Section 10(a) provides that:

> "This power [to prevent any person from engaging in any unfair labor practice affecting commerce] shall

be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." (28 U. S. C. A., Sec. 169(a).)

The Board's argument, and likewise the decision of the Court below, overlooks the fundamental limitation upon the exclusive powers of the Board, namely, that the unfair labor practice must be one "*affecting commerce.*" Petitioner's position is that the grievance, *i. e.,* "the unfair labor practice," cannot "affect," and has not "affected," *burdened* or *interfered* with interstate commerce, so long as petitioner performs the collective bargain, and so long as this Honorable Court prevents the employee from refusing to abide by the collective bargain. Having this limitation in mind, it then becomes obvious that the Board does not have exclusive jurisdiction of this case where the collective bargain necessarily prevents the grievance from "affecting," burdening or interfering with interstate commerce. Hence, Section 10(a) does not stand in the way of the adoption by this Honorable Court of the rule of law which we submit to be the proper interpretation of the Act.

B. The Purpose and Effect of the Employee's Layoff Was Not to Discourage or Encourage Membership in Any Labor Organization Within Section 8(3) of the Act.

The rule adopted by the Second, Fourth, Fifth and Seventh Circuit Courts of Appeals, interpreting Section 8(3) of the Act, requires that the Board make a finding which must be supported by substantial evidence that both the *purpose* and *effect* of a discriminatory discharge is to encourage or discourage membership in any labor organization.

N. L. R. B. v. Air Associates, Inc. (C. C. A. 2, 1941), 121 Fed. (2d) 586, 592, states that:

> "Section 8(3) requires that the discrimination in regard to tenure of employment *have both the purpose and effect of discouraging union membership.** The Board made a clear finding that the *purpose* of the discharge was to discourage membership in the union, and we think that finding was sufficiently supported by evidence. . . . *But we can discover no satisfactory explanation by the Board which would permit either a finding that the unlawful purpose had the effect required by the Act, or findings from which such an effect might reasonably be inferred.* The reinstatement order is modified, therefore, to omit Rudolitz and Geoghegan."

Western Cartridge Co. v. N. L. R. B. (C. C. A. 7, 1943), 134 Fed. (2d) 240, cert. denied (1943) 320 U. S. 746, 88 L. Ed. 30;

Stonewall Cotton Mills v. N. L. R. B. (C. C. A. 5, 1942), 129 Fed. (2d) 629 at 632, cert. denied (1942), 317 U. S. 667, 87 L. Ed. 536;

Martel Mills Corp. v. N. L. R. B. (C. C. A. 4, 1940), 114 Fed. (2d) 624, 633.

The decision of the Ninth Circuit Court of Appeals in this proceeding adopts a different view and does not require that there be substantial evidence that both the *purpose* and *effect* of a discriminatory discharge is to encourage or discourage membership in any labor organization.

The language of Section 8(3) most certainly requires that the Board prove that the discriminatory discharge

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*Italics supplied unless otherwise indicated.

was done with the *purpose* and has the *effect* of encouraging or discouraging membership in any labor organization. The pertinent language of that section provides that:

> "It shall be an unfair labor practice for an employer—
>
> • • •
>
> "(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

The section does not proscribe what might be loosely and generically described as a "discriminatory discharge on account of union activities." It must be discrimination "to encourage or discourage membership" in a labor organization. This requires that the discrimination be practiced with the *purpose* and that it have the *effect* of encouraging or discouraging union membership.

In the instant proceeding, we urge that there is no evidence whatsoever that either the *purpose* or the *effect* of Babbitt's layoff, which the Board found to constitute a discriminatory discharge, was to encourage or discourage membership in any union. There is nothing whatsoever in the record from which any reasonable inference of such purpose or effect may be drawn.

The undisputed evidence shows a collective bargaining agreement with a closed-shop provision requiring petitioner to employ only members of the Union. Such collective bargaining agreement has been in effect at all material times and continues in effect at the present. Babbitt himself has at all times remained a member of the Union. It is, therefore, inconceivable that his layoff could have been made with the *purpose* or especially could in any way

have the *effect* of encouraging or discouraging either Babbitt or any other person from either joining or leaving the Union or any other labor organization, or in refraining from taking any part whatsoever in the Union or in any collective bargaining process. Certainly there is no evidence whatsoever in this record, and there could be none, that anyone was discouraged or encouraged in joining or leaving the Union, or any other union, or carrying on any collective bargaining process as a result of Babbitt's layoff.

The Board argued, and the Court below adopted its argument, that there were *hypothetical* and *speculative* discouragements of union membership as a result of Babbitt's layoff. For example, the Board argued, and the Court followed the argument, that (i) union membership of groups of employees not covered by the closed-shop contract in question "*would be deterred*" by a show of hostility on petitioner's part, (ii) employees included within the instant closed-shop contract "*might cease*" their efforts to obtain its periodic renewals, and (iii) all employees "*might deem it wise*" to forego all active part in Union affairs. [R. 1388-1389.]

We respectfully urge that the *hypothesis* and *speculation* as to what groups of employees not covered by the closed-shop contract *would be* deterred from doing, or that Union members *might* cease efforts to obtain renewals of the collective bargaining agreement, or that Union employees *might* deem it wise to forego Union activities, does not constitute a rational inference from any evidence in the record. It is sheer guesswork. It has no probative basis in the record. It cannot constitute substantial evidence in support of the Board's implied finding that the purpose

and effect of the claimed discriminatory discharge was to encourage or discourage membership in any labor organization.

This, alone, requires a reversal of the Board's order. This necessarily follows, since the Court below has specifically decided that the Board's order cannot be supported under Section 8(1) as an unfair labor practice with respect to petitioner's employees generally. [R. 1389-1391.] Since the case must stand or fall as a Section 8(3) case, the lack of evidence to support the essential finding concerning purpose and effect is fatal to the case.

C. The Board's Order Is Punitive Rather Than Remedial in Requiring Reinstatement of Babbitt Upon His Discharge From the Armed Services, Without Imposing the Same Conditions and Limitations as Are Found in Section 8(b) of the Selective Training and Service Act.

Where an employee is drafted or enlists in the armed services and is discharged therefrom, Congress has imposed a duty of reinstatement of such employee. (*Section 8(b) of the Selective Training and Service Act,* as amended, 50 U. S. C. A., Appendix, Section 308(a), (b), (c).) Pertinent portions of the Selective Training and Service Act of 1940 are set forth in the Appendix attached to this Brief.

This duty of re-employment of a former employee discharged from the armed forces is dependent upon several conditions and limitations. Among them are the following:

(i) The former employee must complete his period of training and service "satisfactorily" in the judg-

ment of those in authority over him and obtain a certificate to that effect, *i. e.*, he must have an honorable discharge;

(ii) The former employee must be still qualified to perform the duties of the position he left in order to perform such training and service;

(iii) The former employee must make application for re-employment within ninety (90) days after he is relieved from such training and service; and

(iv) If he was formerly in the employ of a private employer, such employer's circumstances must not have so changed as to make it impossible or unreasonable to restore him to the same position or to a position of like seniority, status and pay.

A comparison of the Board's order for reinstatement of Arthur Babbitt by petitioner with the foregoing provisions of Section 8(b) shows that the Board did not qualify and limit the order of reinstatement of this employee upon termination of his training and service in the armed forces. For purposes of comparison, in this respect, the Board's order reads as follows:

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

"(a) Upon his application within forty (40) days after his discharge from the armed forces of the United States, offer Arthur Babbitt immediate and full reinstatement of his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges;" [R. 115.]

Thus it is seen that the Board's order omits three of four conditions of Section 8(b) above outlined in fixing its order of reinstatement of this employee.

In fixing an entirely different and more burdensome duty and enlarging and enhancing the rights of the former employee, the Board's order becomes punitive rather than remedial and therefore is plainly in error. The Board has no power to make a punitive order by imposing a heavier duty of reinstatement than that which Congress has established.* The legal obligation of re-employment of an employee who has gone into the armed forces has been fixed by Congress. Apart from this Congressional legislation, there would be no legal obligation of re-employment. The former employee's legal rights extend no further than the provisions of Section 8(b). The legal duty of the former employer is fixed by that standard. It is obvious that an employee leaving his private employment upon enlisting would have no legal right to compel his re-employment upon receiving his discharge, were it not for the provisions of the Selective Training and Service Act or a similar Congressional enactment. Hence, the former employee in this case has only such legal rights of re-employment by petitioner as are fixed by the Act of Congress. Since the Board's order imposes a heavier duty than that announced in the Act of Congress, the order is to that extent punitive, and not remedial.

**Consolidated Edison Co. v. N. L. R. B.* (1938), 305 U. S. 197, 236, states that: "The power [of the Board] to command affirmative action is remedial, not punitive. . . ."

To make the point more vivid, the Court may judicially know that over 100 of petitioner's employees have gone into the armed services, of whom a large number have rights of reinstatement in accordance with Section 8(b) of the Selective Training and Service Act. Babbitt, under the Board's order, is placed in a much more favorable position as to his right of reinstatement when he is discharged from the armed forces than this large number of former employees who also have gone into the armed forces. Since this former employee is rendering full-time services to the Government and will continue to do so for an indefinite period of time, possibly running into a matter of several years, it is only right and just that the legal duty of reinstating him be exactly the same as that for the reinstatement of all petitioner's other former employees who have gone into the armed services. As an example, if any of the other employees fails to obtain an honorable discharge from the armed services, he has no right of reinstatement by petitioner, whereas, regardless of the nature of the discharge of this employee, under the Board's order, he has a legal right to be reinstated.

We strongly urge that the Board's order be modified in the event this Honorable Court does not entirely reverse the order on the other grounds urged by petitioner, so as to incorporate each of the conditions of Section 8(b) as above pointed out.

Conclusion.

We urge that the Petition for Certiorari be granted on the grounds that the Circuit Court of Appeals' enforcement of the Board's order in this proceeding erroneously decided important questions of law involving the proper administration of the National Labor Relations Act.

Respectfully submitted,

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O'MELVENY & MYERS,
Of Counsel.

"(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days* after he is relieved from such training and service— * * *

> "(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his

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*Now 90 days under Act of Congress, P. L. 473—78th Congress, December 8, 1944.

period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." (50 U. S. C. A. Appendix, Section 308(a), (b), (c).)

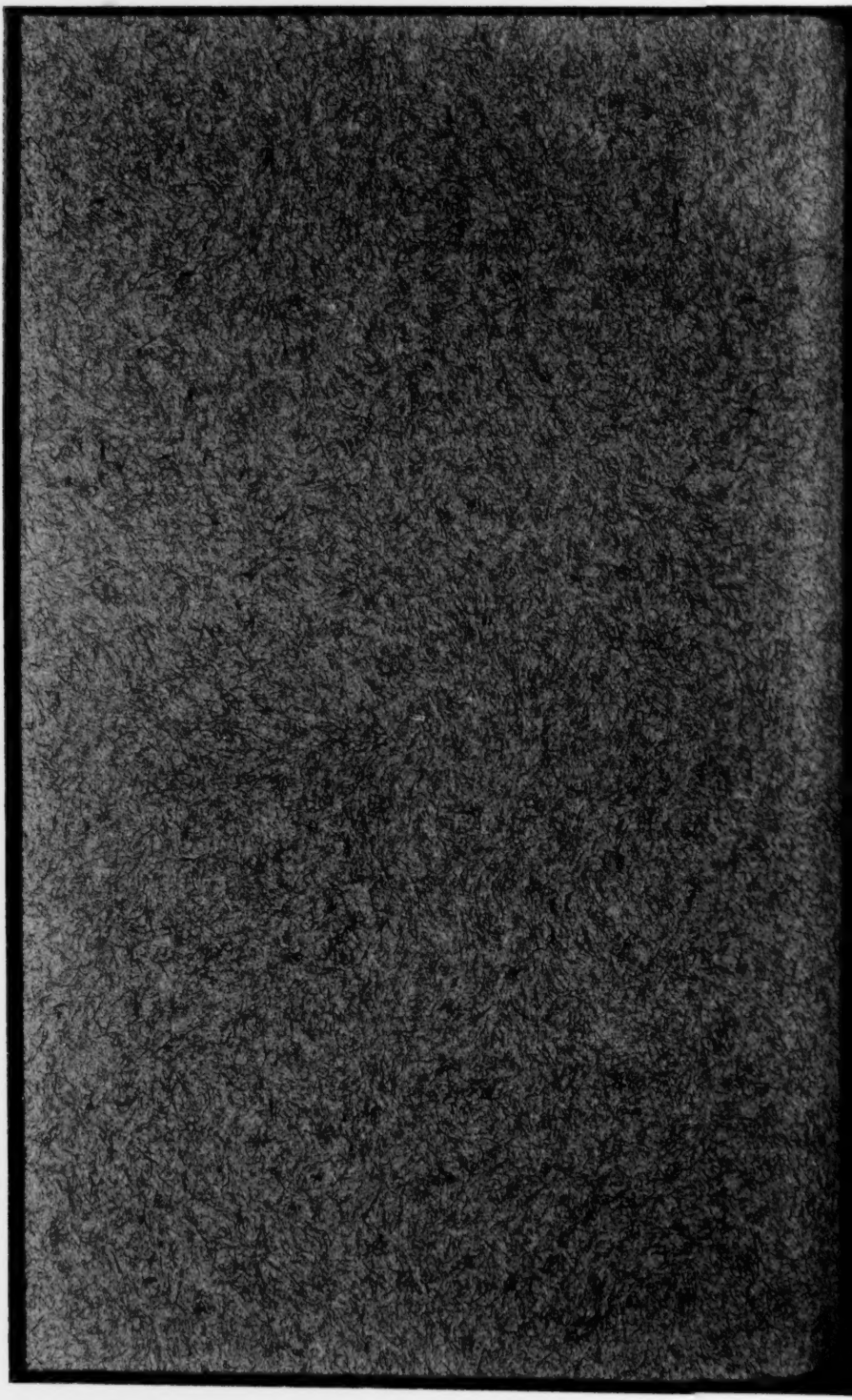
The same requirement of re-employment, subject to the same limitations and conditions, governs in the case of a person who has *voluntarily* entered the armed services rather than having been *inducted* into the armed services *under* the Selective Training and Service Act (50 U. S. C. A. Appendix, Section 357.)

No. 1052

In the Supreme Court of the United States

October Term, 1962

Walt Disney Productions,



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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1021

WALT DISNEY PRODUCTIONS, A CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 1377–1392) is reported in 146 F. (2d) 44. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 110–117, 23–67) are reported in 48 N. L. R. B. 892.

JURISDICTION

The decree of the court below (R. 1392–1394) was entered on December 5, 1944. A petition for rehearing filed by petitioner was denied on Jan-

uary 11, 1945 (R. 1395). The petition for a writ of certiorari was filed on March 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether an employee's failure to submit his discriminatory discharge, otherwise constituting an unfair labor practice under Section 8 (3) of the National Labor Relations Act, to arbitration, pursuant to the provisions of a valid collective bargaining agreement, deprives the National Labor Relations Board of jurisdiction to maintain proceedings under the Act to remedy the effects of, and to restrain, such employer misconduct.

2. Whether, in order for the discharge of an employee because of his union activity to violate Section 8 (3) of the Act, it is necessary that the evidence affirmatively show that the discharge had the effect of discouraging union membership.

3. Whether, upon finding that a discriminatorily discharged employee has entered the armed forces of the United States, the Board is required to frame its normal reinstatement order so as to embody therein all of the limitations and conditions as to reinstatement of returning military personnel contained in Section 8 (b) of the Selective Training and Service Act.

STATUTES INVOLVED

The statutes involved are provisions of the National Labor Relations Act and the Selective Training and Service Act, which are set forth in Appendices A and B, *infra*.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board, on March 31, 1943, issued its findings of fact, conclusions of law, and order (R. 110–117, 26–67). Insofar as here pertinent, the Board found that petitioner, a California corporation, discharged an employee, named Arthur Babbitt, because of his militant membership and activities on behalf of Screen Cartoonists Local 852, affiliated with Brotherhood of Painters, Decorators and Paper Hangers of America, affiliated with the American Federation of Labor (hereinafter called the Union), thereby engaging in an unfair labor practice within the meaning of Section 8 (3) of the Act. This finding was based upon the following underlying facts found by the Board.[1]

Babbitt was one of the ablest and highest paid animators in the animated cartoon motion picture

[1] Petitioner asserts in substance (Pet. 3 n.) that, although it disagrees with the Board's underlying findings, it does not claim that they are not supported by substantial evidence, because "it recognizes that * * * this is not the type of issue this Court will consider." Accordingly, we refer in the Statement only to the pertinent Board findings and do not refer to the evidentiary support.

industry (R. 30–35). He was intensely interested in union organization. Petitioner violently and outspokenly opposed dealing with unions, especially resented Babbitt's militancy when the Union began to organize the studio, and warned him to "cut it out" or he would be discharged. Babbitt nevertheless persisted (R. 35–42). In May 1941, when Babbitt was chairman of the Union, a strike was called under his leadership, principally because of petitioner's refusal to discuss a lay-off program with the organization. The day before the strike began Babbitt was discharged for the first time (R. 42–43).[2] The strike succeeded; the dispute was submitted to arbitration; and the Union entered into a closed-shop contract with petitioner. The arbitrators took cognizance in their award of petitioner's resentment toward Babbitt by making a special provision for his reinstatement and against his discharge in connection with reorganization, except for cause (R. 43–45). Their award also provided a grievance procedure, including arbitration, for settlement of disputes (R. 55, 59–60; see also R. 12–13, Pet. 5). Following conclusion of the strike and Bab-

[2] This discharge is not involved in the case at bar. The reason given Babbitt for the dismissal was that he had "on numerous occasions engaged in union activities of various kinds and descriptions on the company's property and on the company's time" (R. 42). Petitioner had previously freely tolerated such use of its time and property on behalf of an unaffiliated union (R. 35–38, and note 7).

bitt's return to work, petitioner's resentment against him continued. He was given less desirable working quarters, deprived for a time of essential equipment, and denied important or substantial assignments (R. 45–46, 57, 58). Finally, on November 24, 1941, he was included in a mass lay-off of approximately 100 employees. For about 10 days immediately preceding the lay-offs, he had been deliberately assigned no work whatever, so that at the time the lay-offs were effected, he was the only animator in the studio who was unassigned (R. 46, 54, 58). In salary, work rating, and seniority he outranked all those eliminated from petitioner's employ as well as most of those who were retained (R. 30–35, 53–54, 112). The explanations which petitioner advanced to the Board for his inclusion among those laid off were not persuasive as the true ones (R. 47–55, 56–58).

The Union discussed many of the lay-offs with petitioner as grievances under the grievance procedure set up in the arbitrators' award (*supra,* p. 4). It did not present Babbitt's case as a grievance, however, because, according to the arbitrators' award, he was not subject to lay-off, except for cause, and it was considered, accordingly, that his case fell into a category different from that of the other lay-offs (R. 55). Instead, he lodged with the Board an unfair labor practice charge, initiating the case at bar (R. 1–2, 56). Since No-

vember 10, 1942, Babbitt has been on active duty in the United States Marine Corps (R. 114).

Upon the foregoing findings the Board ordered petitioner to cease and desist from its unfair labor practices, to offer Babbitt reinstatement upon application within 40 days after his discharge from the armed forces, to make him whole for net wage losses sustained from the time of the discrimination against him to the date he entered the armed forces, and from a date 5 days after he makes timely application following his discharge from the armed forces to the date of offer of reinstatement, and to post appropriate notices of compliance (R. 114–117).

Thereafter, the Board filed in the court below a petition for enforcement of its order (R. 119–123). Petitioner answered, requesting that the order be set aside (R. 124–132). On December 5, 1944, the court handed down its opinion (R. 1376–1392) and entered its decree (R. 1392–1394), enforcing the Board's order with modifications not here material.

ARGUMENT

1. Petitioner's contention (Pet. 2, 8, 9, 11–12, 14–22) that the grievance and arbitration provision contained in its collective bargaining agreement with the Union operated to deprive the Board of jurisdiction to maintain the proceeding

is refuted by the express terms of the statute. Section 10 (a) of the Act provides that—

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

It is apparent from the face of this provision that Congress intended that the Board should have power to apply the sanctions of the Act to protect the Nation's commerce even though, as here, another "means of adjustment or prevention", established by agreement of the parties, is also available. *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262, 268 (C. C. A. 3), certiorari denied, 314 U. S. 693;[3] cf., *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 264–269; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435. Contrary to petitioner's contention (Pet. 12, 17), it cannot be assumed that merely because of the existence of its agreement with the Union, no disputes can arise from peti-

[3] Essentially the same contention was made in the employer's petition for certiorari in the *Newark Morning Ledger* case (Pet. 6–7, 9–16, No. 307, October Term, 1941).

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tioner's unfair labor practices which may lead or threaten to lead to obstructions to commerce. See Section 1 of the Act; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S., 1, 42, 43. And nothing in the statute suggests, as petitioner further contends (Pet. 2, 8, 9, 12, 16, 19–21), that the Board's jurisdiction shall apply only after other "means of adjustment or prevention" have been exhausted. On the contrary, the statute unequivocally provides in Section 10 (a) that the Board's power shall not be "affected" by such elements.

Equally untenable is the assumption implicit in petitioner's related contention (Pet. 12, 17–19) that the Board may assert jurisdiction only where "the alleged unfair labor practice interferes so substantially with the public rights created by Section 7 [of the Act] as to require its restraint in the public interest" (Pet. 17–18).[4] Congress did not leave the public interest in these matters an open question; it declared that the public interest was involved in all unfair labor practice cases when it found in Section 1 of the Act that employer interferences with the freedom of employees to organize for collective bargaining lead to labor disputes burdening and obstructing the free flow of commerce. This public interest does

[4] Substantially the same contention was also made in the *Newark Morning Ledger* petition for certiorari (Pet. 7, 24–25, No. 307, October Term, 1941).

not disappear because of the private agreement between petitioner and the Union. The limitation suggested by petitioner is inconsistent, moreover, with the unrestricted grant of power to the Board in Section 10 (a) to prevent "any" person from engaging in "any" unfair labor practice affecting commerce. See also Section 10 (b) of the Act; *Jacobsen* v. *National Labor Relations Board,* 120 F. (2d) 96 (C. C. A. 3).

2. Petitioner contends (Pet. 2, 8, 9, 12–13, 22–26) that in view of its closed-shop agreement with the Union it is "inconceivable" that Babbitt's discharge "could have been made with the *purpose* or especially could in any way have the *effect* of * * * discouraging either Babbit or any other person" from union membership or activities (Pet. 24–25). But the underlying facts found by the Board and reviewed in the Statement (*supra,* pp. 3–5) amply support the Board's conclusion (R. 58–59, 112–113) that Babbitt was included in the list of those dismissed because petitioner resented his leadership in activities on behalf of the Union. Petitioner does not claim that these underlying findings are not supported by substantial evidence; indeed, it expressly disclaims any such challenge (see note 1, p. 3, *supra*). And, as the court below held (R. 1388–1389), the facts that there was a closed-shop agreement in existence and that Babbitt remained a member of the Union despite his discharge did not make the Board's inference (R.

61, 112–114) unreasonable that union membership was discouraged by the discrimination. As the court stated (*ibid.*):

> * * * union membership of groups of employees not covered by the closed-shop contract would be deterred by a show of hostility on the part of the employer. Those employees included in the contract might cease their efforts to obtain its periodic renewals. All employees might deem it wise to forego all active part in union affairs thereby in effect relinquishing their right to membership in a labor union.

The fact that there is no direct evidence in the record "that anyone was discouraged or encouraged in leaving the Union, or any other union, or carrying on any collective bargaining process as a result of Babbitt's layoff" (Pet. 25), does not defeat the Board's finding. It has been the Board's consistent view that a discharge because of union membership and activity necessarily discourages union membership, at least that of the discharged employee, and that therefore such discharge is *ipso facto* a violation of Section 8 (3).

This view has been implicitly upheld by this Court in the many Section 8 (3) cases upon which it has passed, for it has often upheld Board findings of violations of the Section simply upon supported findings of discrimination and without other additional evidence of discouragement of the sort which petitioner here asserts is necessary.

E. g., *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 129; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, 255; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177;[5] *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 589, 598, 600, 603.[6] See also S. Rep. No. 573, 74th Cong., 1st sess., p. 11; H. Rep. No. 1147, 74th Cong., 1st sess., p. 19.

Petitioner asserts that in holding that evidence as to the effect of the discharge in discouraging union activities was not necessary, the decision below conflicts with *National Labor Relations*

[5] In the *Phelps Dodge* case, the Court declared that "the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under § 8 (3)" (at p. 187); that "discrimination in hiring [is] an 'unfair labor practice'" (at p. 181); that "it is no longer disputed that workers cannot be dismissed from employment because of their union affiliations" (at p. 183); that "in refusing employment to the two men because of their union affiliations Phelps Dodge violated the Act" (at p. 185). The Court recognized that antiunion discrimination inevitably discourages union membership, for it stated (at p. 185): "The effect of such discrimination is not confined to the actual denial of employment; *it inevitably operates against the whole idea of the legitimacy of organization.*" And further (at p. 186), "We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper."

[6] In the *Link-Belt* case, the Court expressly recognized that the discriminatory discharge of a leader in Amalgamated "would tend to have as potent an effect as direct statements to the employees that they could not afford to risk selection of Amalgamated" (311 U. S., at 598).

Board v. *Air Associates, Inc.*, 121 F. 2d 586 (C. C. A. 2), *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240 (C. C. A. 7), certiorari denied, 320 U. S. 746, *Stonewall Cotton Mills* v. *National Labor Relations Board*, 129 F. 2d 629 (C. C. A. 5), certiorari denied, 317 U. S. 667, and *Martel Mills* v. *National Labor Relations Board*, 114 F. 2d 624 (C. C. A. 4). The language of the Fourth Circuit Court of Appeals in the *Martel Mills* case upon which petitioner appears to rely is clearly dictum,[7] and the *Western Cartridge* case, in the Seventh Circuit, squarely holds that "* * * it is not necessary that the coercive conduct had its intended or desired effect * * *" (134 F. 2d, at 244).

Precisely the same claim of conflict with the *Air Associates* case has been presented to this Court in three petitions for certiorari, all of which were denied. *Butler Bros.* v. *National Labor Relations Board*, 134 F. 2d 981 (C. C. A. 7), certiorari denied, 320 U. S. 789; *National Labor Relations Board* v. *Gerity Whitaker Co.*, 137 F. 2d 198 (C. C. A. 6), certiorari denied, 318 U. S. 763; *National Labor Relations Board* v. *Martin Bros. Box Co.*, 130 F. 2d 202 (C. C. A. 7), cer-

[7] "Our conclusion that there is not substantial evidence to support the Board's findings as to discrimination in violation of Section 8 (3) of the Act makes it unnecessary for us to consider the question of whether the alleged discriminations did actually discourage membership in any labor organization" (114 F. 2d, at 633).

tiorari denied, 317 U. S. 660. In each of these cases the Government's brief in opposition also called attention to the *Stonewall* decision of the Fifth Circuit. As was pointed out in these briefs in opposition, the *Air Associates* case was subsequently "very narrowly limited" by the Second Circuit (*National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. 2d 933, 937 (C. C. A. 2)), and the peculiar circumstances of that case show that it does not support the general proposition upon which petitioner relies.[5]

In the *Stonewall Cotton Mills* case the Circuit Court of Appeals for the Fifth Circuit at first upheld the view for which petitioner here contends, but on the Board's petition for rehearing, the court reversed, or at least seriously modified, its position, and held that the Board properly inferred that a discriminatory discharge had the effect of discouraging union membership despite the absence of any "positive evidence" that it had such effect (129 F. 2d, at 633). The only unmodi-

[5] In the *Air Associates* case the employer had discharged two employees whom, so far as the record showed, it thought to be nonunion men, telling them that it was obliged to do so in order to make room for two union officials who had been previously discharged; upon such facts, the court explained in the *Cities Service* case, it could discover no "rational basis for a conclusion that the discharge violated the Act; for an employer to tell men whom, so far as the record showed, he thought to be non-union men that they must be dismissed to make room for union men, would not necessarily tend to discourage union membership."

fied sentence which might support the claim of conflict relies exclusively upon the *Air Associates* case as authority.

Moreover, even if the claim of conflict were well founded, that would not call for review of the instant case. This Court will not as a rule review a decision which is in accord with the controlling decisions of this Court merely because of the "conflict" created by other lower court decisions which may have applied principles contrary to those announced by this Court.

3. Petitioner contends (Pet. 2, 8, 9–10, 13, 26–29) that the Board's order is "punitive rather than remedial" in so far as it requires petitioner to reinstate Babbitt if he applies within 40 days after his discharge from the armed forces.[9] Petitioner asserts that the reinstatement order should also contain certain other conditions and limitations upon the rights of veterans to reinstatement as provided in Section 8 (b) of the Selective Train-

[9] Since the advent of the war the Board has modified its normal reinstatement order so as to provide that discriminatorily discharged employees who are in the armed forces be reinstated if they apply within 40 days after their discharge from the services. National Labor Relations Board, *Eighth Annual Report* (Gov't Print. Off., 1944), p. 42. The Board recently enlarged the period to 90 days following a similar amendment to the Selective Training and Service Act (P. L. 473, 78th Cong., December 8, 1944). *Matter of Federal Engineering Co., et al.*, decided February 14, 1945, 60 N. L. R. B., No. 112.

ing and Service Act (50 U. S. C. 308 (a), (b), (c)).[10] The contention is without merit.

The provisions as to the rights of veterans to reinstatement under the Selective Service Act have no necessary relation to the purposes and policies of the Labor Relations Act, which the Board's order is designed to effectuate. Section 10 (c) of the Act. Nor is there any inconsistency or conflict between these purposes and policies, requiring their accommodation to one another. Cf., *Southern Steamship Co.* v. *National Labor Relations Board,* 316 U. S. 31. The purpose of one is to grant honorably discharged veterans limited rights to reinstatement upon completion of their service in the armed forces; the purpose of the other is to protect the Nation's commerce against interruptions due to employer interferences with the rights of employees to be free from restraint and coercion in organizing for collective bargaining purposes. There is no reason why the fact that Babbitt has acquired certain rights to reinstatement under the Selective Service Act should affect the rights of petitioner's employees, including Babbitt, to full freedom of self-organ-

[10] These include the veteran's honorable discharge from the services, his continued qualification to perform the duties of the position, and the absence of change in the employer's circumstances so as to make reinstatement "impossible or unreasonable."

ization guaranteed in the Labor Relations Act. The Board has found that Babbitt's reinstatement as ordered by it is necessary to give effect to these latter rights (R. 62, 114). The fact that, as petitioner asserts (Pet. 29), Babbitt may be placed by the Board's order in a better position with respect to reinstatement than other veterans does not subtract from the propriety of the Board's order as a remedy for the unfair labor practices. The particular public interest sought to be effectuated by his reinstatement is not involved in the cases of the others, who have, moreover, not suffered the same illegal injury.

It should be noted further that the Board's order does not guarantee Babbitt reinstatement under any and all circumstances upon his discharge from the armed forces. In Babbitt's case, as in all discriminatory discharge cases, circumstances may change in such manner as to render it impossible or inequitable for petitioner to comply. Likewise, Babbitt, like any other person discriminatorily discharged, may so misconduct himself in the interval as to preclude his right to reinstatement. The Board does not attempt in its reinstatement orders to anticipate every contingency which may subsequently disqualify a discriminatorily discharged employee for reinstatement. Such contingencies are left to be dealt

with as and if they arise.[11] This is done in Babbitt's case.

The circuit courts of appeals have uniformly enforced Board orders containing provisions for reinstatement of veterans similar to those contained in the case at bar; none of them has questioned the propriety of the Board's failure to include in its order all of the conditions and limitations of the Selective Service Act. *Humble Oil & Refining Co.* v. *National Labor Relations Board,* 140 F. (2d) 777, 779–780 (C. C. A. 5), enforcing 48 N. L. R. B. 1118, 1120, 1138; *National Labor Relations Board* v. *Gluek Brewing Co.,* 144 F. (2d) 847, 851 (C. C. A. 8), enforcing in this respect, 47 N. L. R. B. 1079, 1083; *National Labor Relations Board* v. *American Laundry Machine Co.,* 138 F. (2d) 889, 890 (C. C. A. 2), enforcing 45 N. L. R. B. 355, 359, 366–367.

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[11] E. g., in *Matter of Central Paint & Varnish Works*, case No. C–2136, the Board did not require the employer to comply with its reinstatement order as to one, Peter Vega, who, subsequent to the Board's order, pleaded guilty to petty larceny. Cf. Brief of the National Labor Relations Board in *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining and Smelting Co.*, No. 337, this Term, pp. 25–32.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1945.

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., sec. 151 *et seq.*) are as follows:

> SECTION. 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.
>
> * * * * *
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
>
> * * * * *
>
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board

* * * shall have power to issue * * * a complaint * * *.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

APPENDIX B

The pertinent provisions of the Selective Training and Service Act (Act of September 16, 1940, 54 Stat. 885, 50 U. S. C. App., sec. 301 *et seq.*), are as follows:

> SEC. 8. (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—
>
> * * * * *
>
> (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> * * * * *
>
> (c) Any person who is restored to a position in accordance with the provisions of

paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

U. S. GOVERNMENT PRINTING OFFICE: 1969

(14)

IN THE

Supreme Court of the United States

October Term, 1944
No. 1021.

WALT DISNEY PRODUCTIONS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Answering Brief of Walt Disney Productions in Support of Petition for Writ of Certiorari.

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SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

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Statement of Facts.

The "Statement" found on pages 3 to 7 of the brief filed by counsel for the National Labor Relations Board in opposition to the petition for writ of certiorari calls for a further statement.

A most unfair picture is presented to this Court by the Board's "Statement." It is not only inaccurate, but it unjustly depicts the circumstances out of which the legal questions presented to this Court arose. It is difficult to ascertain why the Board's counsel found it necessary to present a biased "Statement," aside from its inaccuracies, unless it was intended to prejudice the reader of the petition in giving due consideration to the three legal propositions calling for review. These legal propositions are reviewable without the need for considering the detailed circumstances giving rise thereto. The circumstances are, therefore, immaterial to the proper consideration of this

petition. It was in this belief that Petitioner prepared the shortest possible "Statement" in its petition.

While we stated in our petition (page 3) that we believed a serious error had been committed by the Circuit Court of Appeals in this proceeding in adopting the view that it was bound by the findings of the Board, as it concluded that "there was some evidence in support of the material findings," we nevertheless recognized that the fact the findings are not supported by evidence is not a proper ground in support of a petition for certiorari. Such, however, does not justify the Board in stating the facts in an unfair and inaccurate manner.

One example of such unfairness and inaccuracy is the Board's statement (page 4) that

> "Petitioner violently and outspokenly opposed dealing with unions."

This is not supported by the Record. Petitioner's true attitude toward collective bargaining was accurately stated in a notice posted on all bulletin boards in the Studio two and one-half months before the strike occurred at the Studio. [R. 39, 751-752.] Said notice stated that:

> "The Company recognizes the right of employees to organize and to join in any labor organization of their own choosing, and the Company does not intend to interfere in this right. However, the law clearly provides that matters of this sort should be done off the employer's premises and on the employees' own time, and in such a manner as not to interfere with production.
>
> "Due to world conditions, the studio is facing a crisis about which a lot of you are evidently unaware. It can be solved by your undivided attention to production matters. This is an appeal to your sense of

fairness and I trust it will be sufficient to remedy the matter."

Again, in talks by Petitioner's president, recorded on discs, made to the assembled employees, this same attitude toward collective bargaining was announced. [R. 1238-1239; 1252-1253.] Petitioner's president there announced the policy, adhered to at all times, that the company had been and continued to be ready to bargain collectively with the appropriate bargaining unit designated by a majority of the employees by ballot in an election held for that purpose.

It is not inappropriate to point out that the Board's above-quoted statement as to Petitioner's attitude toward union matters is especially uncalled for. The Board had refused for many months to act upon Petitioner's application filed with the Board, that it hold an election to determine the proper bargaining unit with which Petitioner should bargain collectively. [R. 1220-1225.] Petitioner's application for such determination of the proper bargaining unit was filed with the Board about May 28, 1941, and remained unacted upon by the Board during the entire course of the strike at Petitioner's Studio, and for several months after the settlement of the strike. In November, 1941, the application was withdrawn. [R. 1223-1225.] The failure of the Board to exercise its jurisdiction to determine the proper bargaining unit, if not the major contributing cause of the strike at Petitioner's Studio, was, to say the least, one of the major reasons for the prolongation of the strike over many weeks.

It is true that the Board was willing to accept the testimony of Babbitt, despite the written and posted notices

of Petitioner's position concerning collective bargaining, that Babbitt had been told by Petitioner's president that: "If you don't cut out organizing my employees you are going to get yourself into trouble", and like statements. [R. 41.] However, it is obvious from reading the balance of the Record, which was totally disregarded by the Board, that Babbitt, in his zeal to establish his own case, purposely dropped from his testimony the phrase "on company property" or "on company time" after the words "organizing my employees." The written memorandum of February 6, 1941 above set forth, and the recorded speeches of Petitioner's president repeated the policy that: "However, the law clearly provides that matters of this sort should be done *off the employer's premises** and *on the employees' own time*, and in such manner as not to interfere with production." It is incredible that any warning by Petitioner's president or any other officer was anything other than for Babbitt to refrain from organizing on company property or on company time.

The Board's disregard of the pertinent evidence on this subject is demonstrated by its finding [R. 58] that:

> "Lessing's (one of Petitioner's vice presidents) above-quoted letter dismissing Babbitt in May, 1941, frankly admits that the *action was in punishment for his Union activities.*"

The truth is far from this finding, as shown by the actual discharge letter furnished Babbitt in May, 1941, which reads, on this point, as follows [R. 301]:

> "On February 6, 1941, all employees . . . were advised . . . that all union activities and matters

*Italics supplied throughout unless indicated to the contrary.

should be carried on *off the premises of the company and on the employee's own time* and in such manner as not to interfere with production.

"Since the promulgation of said rule and in fact prior thereto, despite repeated warnings, you have on numerous occasions engaged in union activities of various kinds and descriptions *on the company's time.*"

Here the Board itself, in its purported Findings, conveniently dropped the phrase "off the premises of the company and on the employee's own time."

Thus the finding that Petitioner's president threatened Babbitt in this connection is not based upon substantial evidence. Though it follows Babbitt's oral testimony, that witness clearly and purposely omitted the vital phrase embodying the Petitioner's policy of recognizing the right of union organization off the premises of the company and on the employees' own time, as evidenced by written poster and recorded speeches. The Board was not justified in disregarding such vital and undisputed evidence.

Nor is the Board justified in making a "Statement" in opposition to this petition based upon its finding, which, in turn, is lacking support from substantial evidence, particularly where the Board itself is guilty of dropping this vital phrase and hence of reaching erroneous and unsupported conclusions.

The foregoing is only one of the biased and inaccurate "facts" contained in the "Statement" in the Brief filed on behalf of the Board herein. The balance of the inaccuracies and misstatements are detailed in the Appendix accompanying this Reply Brief.

ARGUMENT.

I.

Grievance and Arbitration Provision of Collective Bargaining Agreement.

The Board has utterly failed to answer, indeed has not even mentioned, Petitioner's basic proposition that Section 10(a) of the Act has no application to this case. It will be recalled that the Petitioner's Brief (pp. 21-22) urges that Section 10(a) cannot apply to this case. The reason is, that it must first be proven that the alleged unfair labor practice is one "affecting commerce" before Section 10(a) has any bearing. Section 10(a) specifically so provides. Hence, when the alleged unfair labor practice is one which does not and cannot burden, interfere with or "affect interstate commerce," Section 10(a) is inapplicable. It is our contention, unanswered by the Board, that a dispute over an alleged wrongful discharge cannot constitute an unfair labor practice "affecting" commerce where there is an applicable collective bargaining agreement containing a grievance and arbitration provision requiring the settlement of all such disputes by arbitration, at least while the employer is ready and willing to have the dispute settled in accordance with such agreement.

Rather than answering our argument as to the inapplicability of Section 10(a), the Board simply asserts that Section 10(a) prevents the adoption of the rule for which we strenuously argue, namely that the Board has no jurisdiction to hear a charge of wrongful discharge until the parties have exhausted their remedy under the collective bargaining agreement which requires the parties to settle by arbitration all such disputes under an existing collective bargaining agreement. We respectfully urge that our

main contention for the adoption of this rule of law requiring exhaustion of such remedy by arbitration is entirely sound and is not defeated in any way by Section 10(a) of the Act when that Section is properly understood and when its limitation, namely "affecting" commerce, is given due and proper weight.

The reference in the Board Brief (p. 7) to the decision in *National Labor Relations Board v. Newark Morning Ledger Co.*, (C. C. A. 3) 120 F. 2d) 262, 268, cert. den. 314 U. S. 693, is of no aid whatever. That case did not involve the question here presented. There was *no* grievance and arbitration provision in the collective bargaining agreement involved in the *Newark Morning Ledger Co.* case. Hence, citation thereto is inappropriate.

II.

Board Must Prove That the Alleged Wrongful Discharge Either Encourages or Discourages Membership in a Labor Organization in Order to Establish an Unfair Labor Practice Within Section 8(3) of the Act.

The Fourth Circuit Court of Appeals has just rendered a decision squarely holding that there must be proof of an intent to discourage membership in a labor organization before there can be an unfair labor practice within the meaning of Section 8(3) of the Act. *National Labor Relations Board v. Draper Corporation* (C. C. A. 4, October 6, 1944) 145 F. (2d) 199, 202. The advance sheet report of this case was received by us subsequent to the preparation of our brief in support of our petition for certiorari. This decision fully supports the position of Petitioner in the instant proceeding and is squarely in conflict with the decision of the Ninth Circuit Court of Appeals herein. The

pertinent language of the Court in the *Draper Corporation* case is as follows:

> "It is perfectly clear that, in the discharge and refusal to reemploy, there was no intent to discourage membership in any labor organization, within the meaning of section 8(3) of the act. The great majority of the employees, who were members of the union continued to work; the company continued to recognize the union as the bargaining representative of its employees; the discharge and refusal to employ did not affect and could not have affected the status of the union as bargaining representative; and there is not a scintilla of evidence to support the conclusion that the discharge of the 'wild cat' strikers or the refusal to reemploy them encouraged or discouraged membership in any labor organization or was intended to have any such effect. Western Cartridge Co. v. N. L. R. B., 7 Cir., 139 F. (2d) 855."

The facts in the instant proceeding closely parallel those in the *Draper Corporation* case in that Petitioner has at all times continued to recognize the Union as the bargaining representative of its employees; has continued its closed-shop collective bargaining agreement with said Union; has continued to employ only members of the Union; the layoff of the employee in question did not affect and could not have affected the status of the Union as bargaining representative; and there is not a scintilla of evidence to support the Board's argument that his layoff encouraged or discouraged membership in any labor organization or was intended to have any such effect.

The *Draper Corporation* decision furnishes an additional and convincing reason why this Court should grant the petition and settle once and for all the final interpretation

of the Act on this important question. It is highly important in the due administration of the Act that this point be settled once and for all.

The Board, in effect, asks this Court to write out of the Act the express language whereby Congress made it an unfair labor practice to discriminatorily discharge an employee *only* where such discrimination was done with the purpose and effect "to encourage or discourage membership in any labor organization." The Board asks the Court to adopt the view announced by the Ninth Circuit Court of Appeals in this case, that, in effect, every discriminatory discharge amounts to an unfair labor practice, even though there is no evidence whatever that it had any purpose or effect of encouraging or discouraging membership in a labor organization.

We submit that the quoted language adopted by Congress must be given its ordinary meaning and effect. There is no such thing in the Act as an unfair labor practice by a mere discriminatory discharge. The discriminatory discharge must be coupled with the purpose and effect of encouraging or discouraging membership in a labor organization before it falls within the purview of the Act. Otherwise, the language of Congress is rendered meaningless.

The Board's attempt to distinguish the language of decisions in the Circuit Courts of Appeals which fully support the position of Petitioner on this point, and which are in direct contradiction to the decision of the Ninth Circuit Court of Appeals in this proceeding, is futile. The conflict is apparent to anyone who gives a fair reading to the decisions cited on this point in our Brief.

III.

Selective Training and Service Act.

Despite the argument found in the Board's Brief (pages 14-17), the fact remains that the order for reinstatement of Babbitt upon his discharge from the service, is "punitive" and not "remedial." To this extent it violates the holdings of this Court which have consistently compelled the Board to adhere to the rule that its order should be remedial and not punitive.

While the Board makes the unsupported assertion that the form of this order is necessary in order to afford a full remedy to the employee in question, the Board fails to show how this is true. The Board's argument rests with a mere assertion. It fails to make any showing that the order is not punitive.

The order in question is certainly punitive. It compels Petitioner to reemploy a person who enlisted in the armed services in November, 1942, and who has been continuously in the service since that date and still remains in service. Approximately 2-½ years have expired, during which time the employee has been prevented, through no action of Petitioner, from performing his employment duties.

If he had not been laid off in November, 1941, and had remained in Petitioner's employ until he enlisted, the employment relationship would have terminated without any obligation of reemployment, except for the legislation of Congress embodied in the Selective Training and Service Act. The sole legal right of reemployment, then, is de-

pendent exclusively upon the Act of Congress. Hence, if the Board's order requires reemployment of Babbitt under the exact terms and conditions of the Selective Training and Service Act, he will be placed in precisely the same position he would have been in had there been no layoff in November, 1941. Thus a full and complete remedy is afforded to him by conditioning the order of reemployment upon the terms and limitations of the Selective Training and Service Act. Any additional obligation of reemployment imposed by the Board's order constitutes a mere punishment of Petitioner, is patently disciplinary and is thus erroneous, in view of the principle uniformly adhered to by this Court in reviewing Board orders. The Congress has not delegated to the Board any authority to increase the rights of reemployment of a former employee who has gone into the service in excess of those rights established by the Selective Training and Service Act. Where Congress has fixed the extent of the rights of reemployment of such persons, the Board has no delegated authority to enhance those rights in the form of a punitive order. The Board's authority is simply to see that the employee is given such a remedy as will put him in the same position he would have occupied but for the alleged unfair labor practice. (The argument under this Paragraph III with regard to the Selective Training and Service Act is made without in any way waiving the contentions of Petitioner that the Board's order is unenforcible as pointed out under Paragraphs I and II of Petitioner's Brief and this Reply Brief.)

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be granted in order for this Court to review important questions of law presented by this proceeding and in order to settle a uniform rule of interpretation of Section 8(3) of the Act, in view of the existing conflict of decisions amongst the various Circuit Courts of Appeals.

Respectfully submitted,

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APPENDIX.

1. The Board's Brief (page 4) states that:

> "In May, 1941, when Babbitt was chairman of the Union, a strike was called under his leadership, *principally because of petitioner's refusal to discuss a lay-off program with the organization.*"

The italicized language is based upon a false assumption of the brief writer. There is neither a Board finding nor any evidence in support of such statement.

There were a number of factors involved in the strike at Petitioner's Studio at the end of May, 1941. The principal cause, in Petitioner's belief, was one at least partially ascribable to the Board itself: Petitioner's employees had formed a union several years before and had, through proper proceedings before the Board, obtained certification that it was the proper bargaining unit for employees in the classifications involved. [R. 239, 240.] This certification was in full force and effect in the spring of 1941. A different union, the Screen Cartoonists Local 852, began its organizational activities of Petitioner's employees in the fall of 1940, and at that time claimed to have a majority of the employees. [R. 283.] It was an extremely doubtful and completely unsettled matter as to which union represented the majority. Furthermore, the Screen Cartoonists Local 852 claimed that the other union, certified by the Board as the proper bargaining unit, was company-dominated. Under these circumstances, it was absolutely necessary for the Board to exercise its jurisdiction and determine which represented the majority. This, Petitioner specifically requested the Board to do. [R. 1220-1225.] Nevertheless, the Board refused to exercise its jurisdiction. [R. 1223-1225.] This, Petitioner believes, was one of

the main causes of the strike. Petitioner at all times publicly announced the policy which it consistently pursued, that it would bargain collectively with the union representing the majority of its employees, as determined at a proper election. These facts demonstrate the inaccuracy in the Board's brief, that Petitioner's alleged refusal to discuss a layoff with the Union was the principal cause for the ensuing strike.

2. The Board's Brief (page 4), states that:

> "The arbitrators took cognizance in their award of petitioner's resentment toward Babbitt by making a special provision for his reinstatement and against his discharge in connection with reorganization, except for cause [R. 43-45]."

It is merely the briefwriter's unsupported assumption that the arbitrators took cognizance in their award of any alleged resentment by making a special provision for Babbitt's reinstatement.

The only thing in the Record is the provision in the arbitrators' award of August 2, 1941 [R. 43] stating that:

> "However, with respect to the case of Art Babbitt, it is the judgment of the arbitrators that he be reinstated to his former position and not subject to discharge incident to reorganization except for cause."

3. The Board's Brief (page 5), states that, after Babbitt's reinstatement of September, 1941, following the close of the strike:

> "He was given less desirable working quarters, deprived for a time of essential equipment, and denied important or substantial assignments [R. 45-46, 57, 58.]"

Babbitt complained that the room he had worked in before the strike had been assigned to another employee and that when he went back to work on September 17, 1941, he was assigned to a different room (Board's Brief, page 19.) Babbitt likewise complained that his new room was without a moviola used in viewing test film in the course of animation.

The true condition was fully explained by Petitioner [R. 782-783.] The room Babbitt had formerly worked in was located at the far end of the corridor and had an adjoining small room for an assistant. The only difference between the former room and the room he was placed in on reinstatement was the fact that it was not at the far end of the corridor and did not have the small adjoining room for the assistant. But from the standpoint of space, air conditioning, lights, drawing board and all other things required for an animator, it was identical with his former room. Personnel were frequently transferred and there was no intention of not furnishing him the best possible working conditions. In addition, the moviola was placed in the room within a few days and as quickly as possible, having in mind the confusion incident upon reorganization of the Studio following the strike, then the closing down of the Studio for several weeks, and the layoff of 263 employees. [R. 782-783.]

The statement that Babbitt was "denied important or substantial assignments" is no doubt based upon the Board's purported finding [R. 58] that:

> "The evidence leads directly to the conclusion, and the Trial Examiner so finds, that Adelquist purposely avoided assigning work to Babbitt, * * *"

There is not one shred of evidence to support this finding. It rests upon the sheerest speculation on the Board's part. On the contrary, the affirmative testimony of Adelquist is that he made every effort possible to find work for Babbitt during this period after his reinstatement in September, 1941, and before his layoff on November 24, 1941. [R. 735-739.] This testimony of Adelquist was corroborated by Director Lundy [R. 1087-1089] and by Director Kinney [R. 1054-1055], among others.

If there was work available during this period, it is remarkable that Petitioner's management found itself compelled to lay off 98 employees on November 24, 1941, including six in its animation department. The undisputed evidence is that the animation department was reduced since that date from 25 animators to 12 to 15. [R. 724.] The undisputed facts are therefore simply contrary to the finding of the Board in this connection.

Petitioner's casting director, Mr. Adelquist, stated the true explanation for Babbitt's layoff on November 24, 1941, in the following manner:

After reporting the urgency for reducing personnel in all departments, including the animation department, due to slackened production, Adelquist and three or four other supervisors were faced with the task of selecting 100 employees to be given layoff notices. Of these 100, six of

thirty-one animators then employed were to be given immediate layoff. Five more animators were to be given notices effective when their present work assignments were completed.

A general policy was followed by Adelquist and the Supervisors in making these selections consisting of a composite of these factors affecting the animation department personnel:

(1) Present assignments of each person;

(2) Available work for each person;

(3) Versatility—usefulness throughout plant on all types of work, including Story Department work;

(4) Specialists—animating Mickey Mouse, Donald Duck, Pluto and Goofy characters.

Babbitt was selected for layoff by Adelquist and the other Supervisors on the same basis as the other animators were selected for layoff. Adelquist testified positively as to the work Babbitt was then doing, as to the work available for him, on the question of his versatility and his specialty:

(1) Babbitt ran out of work on November 15, 1941. [R. 736.]

(2) Additional work was not available for Babbitt though Adelquist made every effort to find further work. [R. 736, 737, 739.]

(3) Babbitt was not versatile. He never animated Donald Duck, Mickey Mouse or Pluto. He never worked in the Story Department. [R. 740-741, 744-745.]

(4) His specialty, apart from feature-length pictures of which there was none in production, was a character known as "Goofy," but his animation of that character was not equal to the animation done by Reitherman who was the one selected for retention. [R. 742-744.]

A selection of six of thirty-one artists to be laid off involves matters of judgment, taste and appraisement of aesthetic qualities upon a *comparative basis*. The question is not whether the ones selected were not able to animate. Rather, did each animator meet the foregoing tests better than the others? On *comparative abilities*, Adelquist stated his opinion flatly that, from the standpoint of work available at the time, the animators retained in Petitioner's employ possessed greater merit and ability than Babbitt. [R. 740.] He gave the bases for his opinion in detail [R. 740-745] which may be summarized as follows:

(i) The work in production was mainly on short subjects of Donald Duck and Pluto. Babbitt never worked on and never specialized on those particular characters.

(ii) The men retained were better qualified from a standpoint of versatility on both shorts and features and any type of work, including transfer to the Story Department.

(iii) Being then over-produced on short subjects, it was necessary to retain the organized animation crews of men specializing on Donald Duck and Pluto; and he listed some of the men retained who were specialists on these subjects.

(iv) Babbitt's animation of the special character "Goofy" was not what the studio desired; there were other

men capable of producing the character as desired, particularly Reitherman, who was head of the animation unit specializing on Goofy; and the Director of the Goofy unit, Jack Kinney, preferred Reitherman's animation of this character to that of Babbitt.

(v) Many of the men retained were experienced in Story Department work, whereas Babbitt had never done story work and in Adelquist's opinion he would not work out in that department.

Each ground of Adelquist's explanation is corroborated by a number of undisputed facts in the Record:

(i) *Adelquist Sought to Obtain Further Work for Babbitt When He Ran Out of Work Assignments in November, 1941.*

Director Kinney, in charge of the "Goofy" unit (which character Babbitt claimed as his specialty [R. 427] corroborated Adelquist in this respect by testifying that he was asked in November, 1941, for further work for Babbitt and advised there was none in his unit at that time. [R. 1054-1055.] Director Lundy also corroborated Adelquist in this respect. Lundy directed one of the short subject pictures that Babbitt helped animate after the studio reopened in September, 1941. He testified that either Adelquist or Babbitt had requested him for further work in November, 1941, but that none was available in his unit. [R. 1093.]

(ii) *Work Available for Babbitt in November, 1941.*

The only two feature length pictures in production were ordered shelved in early November, 1941 and completely shelved by November 29, 1941. As the Government pictures involved very little animation, this left only the short-

subject pictures available for thirty-one animators to work on. [R. 740.]

Specialization in animating the short subjects resulted in the main part of the available work being on Donald Duck and Pluto pictures. [R. 740.] There were several animation units where the attached animators had for some years done nothing but Donald Duck and Pluto work and were specialists with whose work the studio was entirely satisfied. [R. 712.]

Babbitt conceded that he never animated Donald Duck. [R. 425-426.] Babbitt did not claim to be a specialist on Pluto [R. 426], and the undisputed testimony is that he did not specialize on that character. [R. 740.] Babbitt did not claim to be a specialist on Mickey Mouse [R. 426] and the uncontradicted evidence is that he had not satisfactorily animated that character. [R. 1266-1267.]

This meant that, considering the available work in production at the time, the only short subject character that Babbitt was experienced in animating was the character "Goofy." [R. 1049-1050.]

There was one animation unit doing the "Goofy" work, under the direction of Director Jack Kinney. [R. 1050.] The head animator for this "Goofy" unit was Woollie Reitherman, who worked directly in conjunction with Director Kinney. [R. 743.]

Kinney testified positively that Reitherman's animation of the "Goofy" character was superior to that of Babbitt's animation of the same character and that if he had the choice between the two animators, he would have chosen Reitherman. [R. 1062-1065.]

Kinney testified, without contradiction, that there was no further work available on the "Goofy" unit for Babbitt

in November, 1941 and that he had so advised Babbitt. [R. 1054-1055.]

The uncontradicted evidence, therefore, corroborates Adelquist that there was no available work for Babbitt in November, 1941.

(iii) *Babbitt Was Not Versatile.*

Babbitt had not animated the specialized characters which carried most of the short subjects then in production, Mickey Mouse, Donald Duck and Pluto. He had no experience in working in the Story Department [R. 744-745], although many of the animators retained have since November, 1941, been transferred to and are employed full time in the Story Department. [R. 744.] Thus, as compared with the other animators who were retained, and in the light of the short-subject program then in production, the uncontradicted evidence fully corroborates Adelquist's testimony that Babbitt was not versatile.

(iv) *Babbitt's Specialty.*

In the one short-subject character specialized in by Babbitt, the character "Goofy," the undisputed evidence shows Babbitt inferior to the head of that unit, Reitherman, the man retained. The testimony of Director Kinney on the comparative abilities of Babbitt and Reitherman in animating the character "Goofy," and the available work in the "Goofy" unit, standing without contradiction, is such significant corroboration of Adelquist's explanation that we request the Court to read Kinney's testimony in full. [R. 1048-1085.]

4. The Board's Brief (p. 5) states that:

> "The Union discussed many of the lay-offs with petitioner as grievances under the grievance procedure set up in the arbitrators' award."

The fact is that 10 of the 98 persons laid off on November 24, 1941, filed grievances with the Union which were taken up and satisfactory disposition of each case resulted. [R. 843, 846, 862.]

5. The Board's Brief (p. 5) in stating that Babbitt's case was not presented as a grievance, states that:

> "Because, according to the arbitrators' award, he was not subject to lay-off, except for cause, and it was considered, accordingly, that his case fell into a category different from that of the other lay-offs."

The Board omits a very vital condition of the arbitrators' award in this respect by neglecting to add the clause "incident to reorganization." This important condition is gone into at length in the footnote on page 6 of the petition for writ of certiorari. The briefwriter's omission of this important clause is inexcusable.